Vol. 88

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No. 51605

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| IN THE MATTER OF THE PETITION OF MERWYN BERKOWITZ and MARILYN S. BERKOWITZ, his wife, | ) | APPEAL FROM THE |
| TO ADOPT | ) | CIRCUIT COURT OF COOK COUNTY, |
| BABY BOY SPETTER, a minor. | ) | COUNTY DIVISION. |

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order denying a petition for the adoption of an infant child. The sole issue is whether there is compliance with the statute requiring that a petitioner for adoption of a child shall be of good repute. Ill. Rev. Stat., ch. 4, §9.1-2(a) (1965).

In March 1965 Merwyn and Marilyn S. Berkowitz filed a petition to adopt Baby Boy Spetter. Nancy Spetter, the mother and sole legal parent, filed her consent to the adoption and on March 22, 1965, the court granted temporary custody of the child to the petitioners. The matter was then referred to the Cook County Department of Public Aid for an investigation of the prospective parents and following the investigation the department filed objections to the petition for adoption. After hearings before the County Division of the Circuit Court the petition was denied. Petitioners were granted custody of the child pending this appeal.

Petitioners have a natural child aged three and decided to adopt another child after Marilyn Berkowitz suffered several miscarriages. She testified that a close friend of her mother called and told her that Norman Rothbart (Petitioners' present attorney) would be able to locate a child suitable for adoption. Mrs. Berkowitz said she had never met her mother's friend and knew her only as "Molly." Petitioners contacted

Rothbart and paid him $400 in cash. On March 22, 1965, Nancy Spetter consented to the adoption and on the same date an interim order was entered making the child a ward of the court, depriving the mother of all parental rights and granting the petitioners temporary custody of the child who was then 17 days old.

During the fitness investigation conducted by the welfare department, Merwyn Berkowitz submitted an income tax form which indicated that his annual income was $6782. He listed monthly living expenses of $216 for rent and utilities, automobile payments of $100 a month and payments on a second car. The case worker questioned petitioners with regard to their ability to live within their income and Marilyn Berkowitz said that her husband had additional income of $6000 to $9000 a year which he did not report on his income tax return.

The case worker got in touch with the Oxford Transducer Company to verify Merwyn Berkowitz' employment and discovered that he had been discharged for forging checks payable to his employer and depositing the funds in his own account. Berkowitz admitted forging endorsements on about $12,000 in checks payable to Oxford. He also admitted embezzling about $2000 from a previous employer and that he had used the proceeds to cover gambling debts incurred at the harness races. As against this evidence, petitioners presented evidence that Merwyn Berkowitz had done good work with youth organizations, that he has learned his lesson and will make a good father.

The trial court, which is specially skilled and experienced in these matters, found however that Merwyn Berkowitz

per letter from Court 10-20-67

was not a reputable person within the meaning of the statute, supra, and denied the petition. The evidence amply sustains the trial court's finding and the judgment is affirmed.

JUDGMENT AFFIRMED

SULLIVAN, P.J. and DEMPSEY, J. concur.

50519

PEOPLE OF THE STATE OF ILLINOIS,) APPEAL FROM
Plaintiff-Appellee, ) CIRCUIT COURT
v. ) COOK COUNTY
ROBERT PRESTON, ) CRIMINAL DIVISION
Defendant-Appellant. )

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Defendant appeals from a verdict and judgment finding him guilty of the crime of armed robbery and sentencing him to a term of 8 to 12 years in the penitentiary. He appeals.

Defendant maintains he was convicted by use of evidence seized as a result of an illegal search and that failure of appointed counsel to make a timely motion to suppress such evidence violated his right to procedural due process of law; that he was convicted by means of a doubtful identification and that under the circumstances his evidence of alibi cannot be disregarded; that he was unduly restricted in his cross-examination of an identifying witness; that the prosecuting attorney made improper and inflammatory remarks to the jury in final argument; and that his guilt was not proven beyond a reasonable doubt.

David Delott testified that on August 3, 1964, he was in an Avis Rent-A-Car office in the 7100 block of South Exchange Avenue in Chicago with William Schroff, the office attendant. At approximately 8:15 or 8:30 P.M. two men walked in the front door of the establishment and one of them stated, "This is a holdup." Delott testified he was pushed behind the service counter with a single-barreled sawed-off shotgun held by one of the men under a raincoat. Delott was ordered to lie face down on the floor. While in this position he heard one of the men demand money from Schroff. Schroff was also on the floor looking for the keys to the safe and one of the men was battering him. Schroff finally opened the safe and the men took the money and left. During the

course of the robbery Delott overheard one of the men say, "I have killed before and it won't be hard to kill again." Delott testified that on August 14, 1964, he witnessed a line-up at police headquarters and viewed five or six men and that he picked defendant out of the line-up as resembling one of the men who committed the robbery but that he could not be certain he was one of the men.

William Schroff testified that on the night in question he was in the Avis office behind the service counter with his back to the front door when two men entered through the door, one of them stating, "This is a stick-up." Schroff was ordered to lie down on the floor. He stated one of the men, later identified by him as the defendant, held a sawed-off shotgun in his right hand under a raincoat. The second man, called "Russ," was behind the counter and was banging Schroff's head on the floor telling him to get to his knees and to find the keys to the safe. Schroff testified he rose to his knees and at that time viewed defendant for some six or seven seconds. The man called "Russ" took money from the safe and from Schroff's wallet and the two men left. On August 14, 1964, Schroff was summoned to the police station to view suspects in connection with the robbery. As he was being led into the police headquarters by an officer he saw defendant sitting in a room with some five other men and immediately stated, "That is the man who did it." Schroff testified that defendant was handcuffed but that he did not know this fact until after he made his identification.

Robert Barrett, a detective assigned to the robbery unit, testified that at approximately 12:00 noon on August 13, 1964, he had a conversation at the police station with a Mr. Howard who rented an apartment at 4535 Woodlawn Avenue in Chicago. Approximately one-half hour later Detective Barrett went to the

third-floor front apartment at that address where he was admitted by Mr. Howard. The witness testified that defendant and Mr. Howard lived in the apartment and that after further conversation with Mr. Howard, Barrett was escorted to a clothes closet in the apartment where he took a double-barreled sawed-off shotgun from under a shirt. Detective Barrett had no search warrant. The shotgun was identified at the trial by Detective Barrett and admitted into evidence. Schroff also testified that the shotgun was similar in size, weight and color to the shotgun held by the defendant during the robbery.

Barbara Preston testified on behalf of the defendant and stated that she and defendant had been married for some five years but they had separated a few days prior to August 3rd. She testified that on the night of the robbery defendant came to her house on East 65th Street at 5:00 or 6:00 P.M. and attempted to settle the dispute which had caused their separation. Mrs. Preston further testified that defendant remained at her home until 11:30 or 12:00 o'clock that night.

Defendant first maintains that the search of his apartment without a warrant and the seizure of the sawed-off shotgun were illegal and that the failure of defense counsel to make a timely motion to suppress this evidence was due to "incompetency and/or lack of diligence by the defense counsel" so as to deprive defendant of procedural due process of law. Defendant was represented by the public defender at trial. From the facts before trial defense counsel with regard to the search and seizure, it appears that the search and subsequent seizure of the weapon was not illegal and we are unable to say that the defense counsel made an improper decision in not filing a motion to suppress.

The law is well settled in this jurisdiction that where two persons have equal rights to the use and occupancy of premises,

either party may consent to a search of the premises and evidence seized thereby may be used against either of them. People v. Palmer, 31 Ill.2d 58, 198 NE2d 839. While it apparently has not yet been held in this jurisdiction that a co-tenant may consent to a search without a warrant of premises jointly occupied with the defendant, there appears to be no legitimate reason why a co-tenant may not so consent in view of the cases which hold that a wife, a sister, or a tenant of the defendant may consent to a search of commonly occupied premises. See People v. Perroni, 14 Ill.2d 581, 153 NE2d 57; People v. Walker, 34 Ill.2d 23, 213 NE2d 552; see also Teasley v. United States, 292 F.2d 460, and State v. McCreary, 179 Neb. 589, 139 N.W.2d, 362. Mr. Howard, as an undenied tenant of the apartment at the 4535 Woodlawn address, had the right to consent to a search of the premises commonly occupied by both him and defendant.

Defendant cites the case of People v. Odom, 71 Ill. App.2d 480, 218 NE2d 116, in support of his contention that the trial defense counsel should have moved to suppress the shotgun as evidence and that his failure to do so was reversible error. In the Odom case defendant signed a written confession submitted to him by the police, it appearing that there had been an understanding between defendant and the police that the confession was executed solely for the purpose of saving defendant's family from embarrassment and also to effect his admission into a mental hospital rather than a prison mental ward. It further appears in the Odom case that certain items of evidence were seized from defendant's home prior to the time defendant executed a waiver of search warrant, although the evidence conflicted on this matter. The facts in that case strongly suggest that trial defense counsel should have filed motions to suppress the evidence and to suppress the confession, whereas in the case at bar the record clearly does not disclose such a situation.

Defendant next maintains his identification was doubtful and unclear for the reason that both Delott and Schroff should have had equal opportunity to observe the robbers, yet Delott said he was not certain defendant was one of the robbers and Schroff had his back to the robbers when they entered the establishment and was immediately told to lie down on the floor. While it is true that Delott was uncertain of his identification of defendant as one of the robbers, the identification made by Schroff was clear and positive. He testified that although he had his back to the door when the two men entered the establishment, he did get an opportunity to view defendant for some six or seven seconds when he was ordered to locate his keys and to open the safe. The next time he saw defendant was when the witness was entering the police station and viewed defendant sitting in a room off the hallway. He immediately and unhesitatingly identified defendant as one of the robbers, which fact was corroborated by Detective Barrett. The question of the weight and credibility of Schroff's identification was a matter for the jury and it is well settled that the testimony of one eyewitness may be sufficient to sustain a conviction even though the testimony is contradicted by the accused, where the witness is credible and where the accused is viewed under such conditions as would permit a positive identification. People v. Brinkley, 33 Ill.2d 403, 211 NE2d 730. Finally, nothing in the record supports defendant's assertion that Schroff's identification was the result of suggestion on the part of the police.

Defendant also argues that the alibi instruction which was given to the jury was improper in that it read that if a person who is tried for a crime shows he was in another place at the time the act was committed he is said to "allege an alibi," whereas the instruction should have read "prove an alibi."

After reading the instruction in its entirety it is evident that this variation in wording did not render the instruction defective, especially in view of the fact that the instruction goes on to state that a defendant does not have to prove his alibi beyond a reasonable doubt.

Defendant further maintains that he was unduly restricted in the cross-examination of Schroff on the issue of identification. Reviewing the record, defendant cross-examined Schroff for some five pages and it appears that he was afforded a reasonable latitude in questioning. It is within the sound discretion of the trial judge as to the extent of cross-examination and we find no abuse of this discretion below. People v. Halteman, 10 Ill.2d 74, 86.

With regard to defendant's contention that the prosecuting attorney engaged in prejudicial closing argument, we feel that the remarks alluded to by defendant were in no way prejudicial to him. In his final argument the prosecuting attorney stated:

> "Ladies and gentlemen, when these men go out on these robberies with these shotguns you think they take them along to scare you with? No, they don't take them along to scare anyone. When they walk in on a man like Mr. Schroff and pound his head and he gets excited, starts swinging, gets out, starts running screaming for the police, bang, that's it."

At a later time the prosecuting attorney stated:

> "That shotgun was taken at 4535--the address, his apartment where he was staying when not living with his wife, in his closet where his clothes were hanging. The man he was staying with looked in the closet, gets excited, says, My God, calls the police."

Defendant maintains that these remarks were not based upon the evidence. However, Delott testified that one of the two holdup men during the holdup uttered the words, "I have killed before and it won't be hard to kill again." Furthermore, we feel the remarks of the prosecuting attorney were within the bounds of

legitimate final argument. People v. Halteman, 10 Ill.2d 74; People v. Lindsay, 412 Ill.472.

Defendant finally maintains that he was not proven guilty beyond a reasonable doubt. The identification of the defendant by Schroff was positive and certain, and was sufficient to sustain defendant's conviction. The shotgun seized from defendant's apartment and identified by Schroff as similar to the weapon used in the holdup corroborated the testimony given by Schroff. On all the evidence in the case we feel defendant was found guilty beyond a reasonable doubt.

For these reasons the judgment is affirmed.

JUDGMENT AFFIRMED.

LYONS, P.J., and BRYANT, J., concur.

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| PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. DONALD BRATCHER, Defendant-Appellant. | ) | APPEAL FROM CIRCUIT COURT COOK COUNTY CRIMINAL DIVISION |

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

After a jury trial defendant was found guilty of voluntary manslaughter for the stabbing of Richard Watley and was sentenced to a term of 3 to 12 years in the State penitentiary. He appeals.

Defendant advances three grounds for reversal: that the evidence did not prove him guilty of voluntary manslaughter beyond all reasonable doubt; that it was improper to have instructed the jury on the question of voluntary manslaughter; and that the prosecuting attorney made certain inflammatory remarks to the jury during closing argument.

Leroy Bell, a State's witness, testified that on April 12, 1965, at approximately 1:00 P.M., he saw defendant and Richard Watley on the east side of Calumet Avenue near 51st Street in Chicago. He stated the two men were approximately 40 feet from him and appeared to be engaged in an argument. Mr. Bell testified that defendant struck Watley and put his hand into his pocket. Watley thereupon ran across the street pursued by the defendant. Watley entered a currency exchange at the northwest corner of 51st Street and Calumet Avenue while defendant waited outside. It appeared to Mr. Bell that persons inside the currency exchange put Watley out of the building at which time defendant struck him and Watley fell to the ground. On cross-examination Mr. Bell testified that while Watley was inside the currency exchange he attempted to pick up a chair, but that people inside the currency exchange forced him out of the building, and that as Watley was exiting the building the defendant struck him with an upward motion of his hand. Mr. Bell further testified

that at no time did he see a knife or any other weapon in the hand of either man, primarily because defendant had his back to the witness and further because defendant blocked much of the witness' view of Watley.

Robert Henry, a State's witness, testified that he resided in the 5000 block of Calumet Avenue and that on April 12, 1965, he was on the front stairs of his home when he saw defendant chasing Watley from the east side to the west side of Calumet Avenue. Mr. Henry testified that the two men "got close together" after which the defendant "walked pretty fast" away from the scene and Watley fell to the ground. Mr. Henry stated that he did not see anything in the hands of either of the two men.

A pathologist who testified for the State detailed the nature of the wound from which Watley died and stated that it was inflicted by a sharp object traveling in an upward direction below the heart of the decedent.

Gilbert Clay testified on behalf of the defendant and stated that on the day in question he was in a barber shop on the east side of Calumet Avenue, some three or four doors north of 51st Street, when he overheard the defendant and Watley arguing in the barber shop over Watley's wife. Defendant left the barber shop and Watley followed him outside. Mr. Clay testified he followed the two men outside where he saw them engaged in a fight. He stated that the fight continued across the street to a currency exchange on the northwest corner of 51st Street and Calumet Avenue where he saw Watley draw a knife. Watley entered the currency exchange after reaching the west side of the street and defendant attempted to keep the door shut in order to keep Watley from coming out of the building. After Watley got out of the currency exchange he lunged at the defendant with a knife and the two men again struggled. Mr. Clay testified that the knife

fell to the ground and that defendant picked it up and ran across the street. Mr. Clay then saw Watley fall to the ground. He further testified that he did not see the actual stabbing because the two men began tussling after Watley had the knife in his hand.

Lester Fleming testified for the defendant and stated he was employed as a barber at the barber shop referred to by Mr. Clay. He testified that defendant entered the shop on the day in question and about five minutes later Watley arrived and proceeded to argue with the defendant about Watley's wife. Mr. Fleming testified that Watley used obscene and abusive language toward the defendant at which time defendant left the shop and Watley followed. The witness further testified that the two men engaged in a fight across the street from the barber shop.

Defendant testified in his own behalf and stated that on the day in question he was in the barber shop referred to by other defense witnesses when Watley entered the shop and began cursing him and calling him obscene names. Defendant left the shop and Watley followed. Defendant testified that Watley "went in his pocket for his knife" and threatened to kill him. Defendant struck at Watley's hand at which time he felt a knife blade in Watley's pocket. Watley backed away from defendant while attempting to pull the knife from his pocket and defendant picked up a stick and struck Watley as the two men moved across the street toward the currency exchange. Defendant testified that Watley again threatened to kill him as Watley backed through the door of the currency exchange. Defendant further testified that as Watley went into the currency exchange he picked up a chair and threw it at the defendant and then came at defendant with a knife in his hand. Defendant attempted to hold the door closed but was unable to do so, and as he let go of the door handle he grabbed for Watley's right hand which held the knife. Defendant testified

that this was when Watley was stabbed. Defendant also stated that he then picked up the knife which had fallen to the ground and ran and that he later learned that Watley had been stabbed. Defendant testified that he acted out of fear of being stabbed, that he knew previously that Watley carried a knife and that he, defendant, had no knife on his person at the time of the incident.

Defendant's first two contentions involve the question of whether he was proven guilty of voluntary manslaughter beyond a reasonable doubt. He maintains the evidence shows him to either be guilty of murder or to be innocent, that there was no evidence of voluntary manslaughter introduced and that it was therefore error for the trial court to have given the instruction on voluntary manslaughter to the jury. From the record the jury could readily have found defendant guilty of voluntary manslaughter in that the evidence shows him to have been inflamed by an argument immediately preceding the stabbing and to have been the agressor.

The provocation necessary as an element in the crime of voluntary manslaughter commenced with the cursing of defendant and threats by Watley both inside and outside the barber shop. See Ill. Rev. Stat. 1963, Chap. 38, Par. 9-2(a). The argument grew worse as defendant chased Watley across the street and into the currency exchange and culminated in the final struggle between the two men wherein Watley was stabbed. That defendant was the agressor cannot admit of doubt in view of the fact that he pursued Watley across the street and into the currency exchange and in view of the fact that Watley attempted to hit defendant with a chair while in the establishment, which action is inconsistent with defendant's position that Watley had a knife in his hand. While we agree with defendant's contention that where the evidence admits one of two conclusions, that defendant is either guilty of murder or is innocent, an instruction and form

of verdict on manslaughter is improper (see People v. Newman, 360 Ill. 226, 231-232,) this principle has no application to the case at bar for the reason that the evidence here does admit of the conclusion that defendant was guilty of voluntary manslaughter.

As to the question of whether defendant was proven guilty of voluntary manslaughter beyond a reasonable doubt, there is ample evidence in the record for the jury to have so found, depending on which set of facts the jury chose to believe. The question of credibility of witnesses is one for the trier of fact and it is well settled that a reviewing court will not interfere with a jury's determination in this regard unless it is clear that such determination is palpably or manifestly erroneous. People v. Woods, 26 Ill.2d 582, 585.

Similarly, as to the question of the defense of self-defense, if the jury believed the evidence of the State, which it obviously did, defendant was the agressor and acted out of passion when he stabbed Watley. Defendant's act of pursuing Watley across the street and into the currency exchange, his testimony that Watley threw a chair at him while in the establishment and his testimony that he picked up the knife and ran after the final struggle, are clearly inconsistent with his defense of self-defense.

Defendant cites the cases of People v. Newman, 360 Ill. 226, and People v. Smith, 403 Ill. 350, in support of his position that the defendant was not acting under a sudden or intense passion at the time of the stabbing. Neither of these cases are in point. The Newman case involved a defendant who had escaped to a safe place, out of range of the victim's weapon, and then deliberately returned to meet the victim at which time he killed the victim. Defendant there had ample time to collect his reason. In the Smith case the victim pursued the defendant in an automobile for some distance to the door of the defendant's

home where the killing occurred after a scuffle, which clearly could not have been considered to have resulted out of sudden impulse. Furthermore, defendant was found to have acted in self-defense.

Defendant's final contention is that the prosecuting attorney engaged in improper and prejudicial conduct in his closing argument to the jury. During closing argument the prosecuting attorney stated:

> "Ladies and Gentlemen, I represent Mr. Bratcher as well as I represent everyone of you sitting on this jury.
>
> "I am paid a salary by you people in Cook County. I am paid to prosecute people not persecute people. If I, for one minute, thought that the defendant, Donald Bratcher, didn't maliciously and intentionally stab the deceased, Richard Watley--
>
> "We do not prosecute people we think to be innocent. We are State's Attorneys second but lawyers first. And, as a lawyer, I have a duty to uphold justice, and I wouldn't be upholding justice if I was prosecuting a man whom I did not think was guilty."

While it is true that a prosecuting attorney should refrain from engaging in this type of argument and while the trial court should have sustained defense counsel's objections thereto, these remarks did not harm defendant in view of the clear evidence in the record of his guilt. The case of People v. Fuerback, 66 Ill. App.2d 452, cited by defendant in support of his position in this regard is distinguishable from the case at bar in that in the Fuerback case there were numerous highly prejudicial errors committed, all of which combined to deprive defendant of a fair trial. This is not the situation in the case at bar.

For these reasons the judgment is affirmed.

JUDGMENT AFFIRMED.

LYONS, P.J., and BRYANT, J., concur.

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No. 51356

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| PEOPLE OF THE STATE OF ILLINOIS, | ) | APPEAL FROM |
| Plaintiff-Appellee, | ) | CIRCUIT COURT |
| vs. | ) | COOK COUNTY |
| EDWARD SOMERVILLE, | ) | CRIMINAL DIVISION |
| Defendant-Appellant. | ) | |

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Edward Somerville, hereinafter referred to as defendant, Paul Langusch, Robert Somerville, Gail Somerville, Douglas Aldridge and Leon Arnold were indicted for the crime of armed robbery. (Robert Somerville, Gail Somerville and Paul Langusch were previously tried and found guilty, and their convictions were upheld on appeal. See People v. Somerville, 71 Ill. App. 2d 381.) Defendant was tried alone at a jury trial, was found guilty and was sentenced to a term of ten to twenty years in the State penitentiary. On this appeal he maintains that he was denied a fair trial on the grounds that the State permitted perjured testimony to be heard by the jury, that the trial court improperly allowed a defense witness to be impeached by means of a felony conviction which was too remote in time, and that the same defense witness was improperly impeached by means of a prior misdemeanor conviction.

Robert Olszewski, manager of the Zayre Department Store in Bridgeview, Illinois, testified that on March 23, 1963, robbers took some $22,000 from him at the store and escaped with $13,000 thereof. About 10:00 P.M. on that day Olszewski and assistant store manager Jerry Hayer were in the cash office of the store when Olszewski heard a commotion in the main part of the store. He looked into the store proper and observed an armed man whose head was covered by a hood. Olszewski and Hayer were told to lie on the floor and to remain quiet. The hooded man left and shortly thereafter Olszewski heard gunshots and the crashing of glass. In the store Olszewski found the janitor had been shot. Olszewski recovered a cloth bag in the vestibule of the store containing

some of the money taken in the robbery. Next to the bag was found a shoe, and outside the store another shoe was found. Hoods were found in and near the store. Approximately one mile from the store a 1963 dark-colored, four-door Chevrolet automobile was found.

Leon Arnold, the State's principal witness, stated that he was under indictment for the robbery in question. He testified that on the evening of March 23, 1963, he was drinking in various taverns with Douglas Aldridge and saw defendant in one of the taverns. Defendant told Arnold and Aldridge that he "had something good" and that it related to the Zayre Department Store. The three men drove in defendant's automobile to a house in the Blue Island area where they met with defendant's two brothers, Robert and Gail Somerville, and Paul Langusch. Robert Somerville was a security guard at the Zayre Department Store and Gail Somerville outlined the plan for the robbery of the store. Paul Langusch was told to "pick up a hot car" and left the house.

Arnold testified that Gail Somerville was to drive Robert Somerville's pick-up truck to the department store for use as one of the "get-away cars." Arnold, Aldridge and defendant were to enter the store before it closed and wait in a storeroom until they received a prearranged signal from Langusch. Langusch, parked in the stolen automobile in front of the store, would let the men inside the store know by way of a walkie-talkie when the cashiers had left the store and when the lights were put out. After the robbery, the men were to make their escape in the stolen automobile, which was then to be abandoned, and Gail Somerville was to pick up the men in the truck where they were to hide under mattresses in the rear of the truck.

The men proceeded to the Zayre Department Store, Gail Somerville in the pick-up truck, Langusch in a stolen dark-colored, four-door 1963 Chevrolet, and the rest of the men in defendant's automobile driven by Robert Somerville. Pursuant to the plan,

Langusch remained outside the store in the stolen automobile, while defendant, Arnold and Aldridge entered the store, proceeded to the storeroom, donned hoods which they had made for the occasion, and waited for the signal from Langusch.

Arnold testified that after a while, when they had received no signal from Langusch, the three men proceeded into the store where they encountered the janitor. A fight ensued, the janitor was "getting the better" of Arnold and Aldridge, and one of the other men shot him. The money was taken and the three men fled.

Arnold testified he discarded his hood and that he had only one shoe on which he likewise discarded. Both of these items were recovered in the store and were identified by Arnold at the trial as belonging to him. Arnold ran from the store and finally stopped in a prairie on 95th Street near the Starlite drive-in theater where he unexpectedly met Aldridge. Aldridge was also missing a shoe, which was found near the department store and which Arnold identified at the trial as belonging to Aldridge. Aldridge gave Arnold some of the stolen money which he had in a cloth bag and in his pocket and the two men began walking. When they neared the Southwest Highway, Arnold made a telephone call and the two men were picked up by Gail Somerville about 8:00 on the morning of March 24th.

Arnold, Aldridge and Gail Somerville drove to an unidentified woman's house on 99th Street where they met with Langusch, Robert Somerville, defendant, and defendant's third brother, Donald Somerville, a Chicago policeman. While the woman doctored Arnold and Aldridge's feet, the money from the robbery was counted and split between the participants of the robbery. The men each paid the woman $50 and left.

In response to questioning by the prosecuting attorney, Arnold stated that he was never convicted of a felony, that an indictment for aggravated battery was pending against him for a matter occurring after the robbery in question, that he was made no promises of leniency by the State's Attorney's office nor by any other police agency in return for his testimony and that the reason he was testifying against his confederates was because he did not want to go to the penitentiary.

Mrs. Beatrice Rahn testified that she lived kitty-corner from the Somerville residence in Worth Township. She stated that the Somervilles owned different trucks at various times, that she saw a truck in the Somerville driveway on the afternoon of March 23, 1963, and that Gail Somerville and Paul Langusch were near the truck that day. The witness further testified that she noticed the truck leave the Somerville driveway about 9:30 P.M. on March 23rd because the truck's lights shined into her front window as it pulled out of the driveway and that she heard it return about 11:00 that same night. Mrs. Rahn also observed two mattresses on the rear of the truck the following morning.

Mrs. Judy Stark testified that she was employed at the Zayre Department Store and that when she left the store about 10:10 P.M. on March 23, 1963, she walked toward a dark-colored 1963 Chevrolet automobile which she thought belonged to Jerry Hayer and observed a person sitting in the automobile who resembled Robert Olszewski. She observed the person from a few feet away and the person turned away. Mrs. Stark later identified that person as Paul Langusch from numerous photographs shown to her and again in a police line-up in February of 1964.

Officer John Browne testified that he arrested Aldridge on April 29, 1963, in Blue Island and that at that time he recovered a walkie-talkie from Aldridge's automobile, previously identified at the trial by Arnold as one of the walkie-talkies used in the robbery. The officer further stated that Arnold and Gail Somerville were also arrested at that time. FBI agent Robert Matheson testified he arrested defendant on January 26, 1965, in a motel in Los Angeles, California, living under the name of James Baker.

A defense of alibi was raised by defendant. He also attempted to show by evidence that Leon Arnold testified as he did because of a grudge Arnold held against defendant for an incident occurring in June of 1963. Defendant's alibi witnesses, John

Johnson, Thomas Smith and Mrs. Delores Smith, testified substantially that defendant and they were in a restaurant in Oak Forest, Illinois, at the time the robbery was being committed, and that defendant did not leave the restaurant until 11:30 P.M. or later on the date in question.

Donald Allen Somerville, defendant's father, testified that on June 1, 1963, he observed Leon Arnold outside the home of defendant's brother, Donald, accusing defendant of having taken Arnold's wife to a party. The witness testified there was a scuffle, that Arnold was struck in the face and that Arnold told defendant, "I will get even with you if it takes the rest of my life." Mr. Somerville testified further that he saw defendant outside a courtroom in Florida on April 29, 1964, and that defendant had stated that the judge freed him. The witness stated that Leon Arnold, who was also present, then stated to a nearby deputy sheriff, "What the hell kind of law do you have here? I came all the way, 1,500 miles to get even with that guy and he was turned free."

On cross-examination of the witness the prosecuting attorney brought out that the witness was convicted in 1945 of burglary, that he pleaded guilty to the charge and that he received a sentence of 5 years probation; he further testified he also received 90 days in the county jail for breaking a window.

Mrs. Mary Somerville, defendant's mother, testified she overheard Leon Arnold say to a Fort Lauderdale sheriff, "What the hell. I come all the way down here to get that guy because he's going -- and the judge wouldn't free -- and the judge freed the guy."

Defendant testified in his own behalf and denied having taken any part in the Zayre Department Store robbery. He testified among other things, that on June 1, 1963, he was at a party at his brother's house when Leon Arnold drove up in an automobile and shouted obscene words at him. Arnold was struck in the face and

threatened to get even with defendant. Defendant further testified he moved to Florida in 1964 and later learned that he was under indictment for the Zayre Department Store robbery and that he went to court in Florida in regard to the matter. After having received permission from the judge to leave and upon leaving the courthouse, he overheard Arnold state to a sheriff's police officer that he (Arnold) travelled 1,500 miles to get even with defendant and that defendant was freed. Defendant further testified that he then moved to California and lived under an assumed name until he was arrested and brought back to Illinois.

Leon Arnold testified in rebuttal and denied having had a fight with defendant. Mary Campbell, Arnold's common-law wife, testified that she did not attend a party with defendant and further denied knowing defendant.

Defendant's first contention, that he was convicted as the result of perjured testimony, is without merit. The contention is based upon the fact that Leon Arnold testified at the trial in the instant cause that he was given no promises by the State's Attorney's office or any other police agency, whereas at a trial involving Donald Somerville and Marjorie Kullerstrand some five months later, when testifying to matters relating to the instant cause in response to questions propounded by the same attorney who prosecuted the instant cause, the following testimony was elicited from Arnold:

"Q. Did the sheriff's police tell you that you would probably benefit by telling the truth?

A. I expected leniency if that's what you mean.

Q. You expected leniency?

A. Yes, sir.

Q. From the sheriff's police?

A. Yes, sir.

Q. You expected the sheriff's police to be able to help you, is that right?

A. Yes, sir.

Q. And he told you to come to the State's Attorney's office?

A. Yes, Sir.

Q. And is that the first time you met Mr. Tuite (prosecuting attorney)?

A. Yes, sir."

* * * *

"Q. And did Mr. Tuite tell you that it would benefit you to tell the truth?

A. I don't understand what you mean.

Q. You are having difficulty?

A. Yes.

Q. You wanted to help yourself, is that right?

A. Yes.

Q. Did you express your feelings that you wanted to help yourself to Mr. Tuite?

A. Yes.

Q. Did he say he could help you?

A. He said I could probably get leniency.

Q. He told you, you would get leniency, is that right, and you expect leniency, is that right?

A. No, I don't expect leniency, I hope for it."

Defendant is in error in attempting to equate the words "He said I could probably get leniency" with the making of a definite promise. It is clear that leniency was a mere expectation on Arnold's part; there is not one word in the above testimony of any promise having been made that Arnold would get leniency if he testified for the State. Furthermore, there is no indication that the conversation with regard to leniency between Arnold and the prosecuting attorney did not occur within the five months between the trial in the instant cause and the trial from which the above testimony was excerpted. It should also be noted that the question of leniency goes to the credibility of Arnold as a witness and that the jury was presented with a great deal of evidence that Arnold testified as he did due to a grudge he held against defendant; the jury nevertheless chose to believe Arnold's testimony which was corroborated by the other witnesses for the State.

The cases of Napue v. Illinois, 360 U.S. 264, and People v. Agnello, 35 Ill. 2d 611, so heavily relied upon by defendant in support of this position are not in point. In each of these cases the witness testified there had been no promise made to him by the State in consideration for his evidence, whereas there had in fact been a promise of consideration made and the prosecuting attorney knew of the promise during the questioning. This is not the situation in the instant cause.

Defendant next contends that Donald Allen Somerville was impeached by means of a felony conviction too remote in time to have any bearing on his truth and veracity. In support of this position he cites the case of People v. Henneman, 323 Ill. App. 124, which holds that a conviction for a crime which occurred when the witness was 18 years of age some 21 years prior to the time the conviction was used to impeach the witness was too remote under the circumstances of the case. In view of the later cases of People v. Buford, 396 Ill. 158, which holds that the statute fixes no limitation as to the time when a prior conviction may be utilized to affect the credibility of a witness, and People v. Brown, 69 Ill. App. 2d 212, which comments on both the Buford and Henneman cases and which also holds that the statute prescribes no such time limit, defendant's contention in this regard cannot be sustained.

Defendant's final contention is that the same witness, Donald Allen Somerville, was improperly impeached by way of evidence of a conviction of a misdemeanor in the form of a conviction for breaking a window and a sentence therefor of 90 days in the county jail. This contention is likewise untenable. In the first place, the testimony elicited from the witness in this regard immediately followed his testimony concerning the conviction for burglary, to which charge he pleaded guilty and for which he received 5 years probation. The prosecuting attorney then asked, "Aside from receiving five years' probation, you also received time in the County Jail?" The witness answered, "Ninety days for breaking a

window." It is difficult to determine whether the 90 day sentence was imposed as a part of the burglary judgment, or whether it related to some other misdemeanor offense. The evidence pertaining to the breaking of the window was cumulative and its admission into evidence was not prejudicial error.

We do not find any reversible error. Therefore, the judgment is affirmed.

AFFIRMED.

LYONS, P.J., and BRYANT, J. concur.

Although this matter is advanced as error on this appeal, no objection was raised below with regard to the admission of the evidence relating to the felony conviction or the evidence about the 90-day sentence. Defendant cannot now be heard to complain in this regard

# ROUTING SHEET

Date: 11-1-67

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Pres
__Sec to Pres
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Secretary
Treasurer
Controller

) in C Adv & Sales
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__Sales Dept
__Adm Asst
__Order Processor
__L Sch Div
__Misc Div
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__Trade Div

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__Prep Dept
__Pub Pl Dept
__Prod Asst

__O in C Bus Mgmt
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__Bus Dept
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__Bkkg Div
__Cash Sec
__Corresp Sec
__Posting Sec
__Roldex Sec
__Files Sec
__Credit Div
__Off Serv Dept
__Bldg M & TrDiv (Chgo)
__Dicto Div
__Mail&Phone Div
__Pur Div
__Sub Dept
__Checking Div
__Mach Room Div
__Records Div
__Pers Dept
__Req Dept
__JB Div

__O in C Mfg
__Mfg Dept
__Adm Sec (Mfg)
__Bldg M & Tr Sec (Mund)
__Prod Sched Sec

__Comp Div
__Hand Sec
__Lino Sec
__Photo Plate Sec
__Proof Sec

__Press-Bind-Ship Div
__Bind Sec
__Press Sec
__Ship & Rec Sec

__Credit Union
__Benevolent Assn
__JB & Co (Md)

For Action __For Info __See Me __Call Me __File
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Gen No 51,356 (Abt)

This opinion is in Edtl as
of 10-3-67 - filed 9-22-67
re is modification -

25M Adm SOP #30 Fm 2 Adm—1

51356

| | | |
|---|---|---|
| PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. EDWARD SOMERVILLE, Defendant-Appellant. | ) | APPEAL FROM CIRCUIT COURT COOK COUNTY CRIMINAL DIVISION. |

MODIFICATION OF OPINION

MR. JUSTICE BURKE DELIVERED THE MODIFICATION OF THE OPINION OF THE COURT:

In the full paragraph on Page 7 of the opinion, the complete sentence ten lines from the bottom of the page is stricken, beginning with the words "Furthermore, there is no indication . . . " and ending with the words ". . . and the trial from which the above testimony was excerpted."

After the last complete sentence in the partial paragraph at the top of Page 9 of the opinion, ending with the words ". . . was not prejudicial error." add the following sentences: "Although this matter is advanced as error on this appeal, no objection was raised below with regard to the admission of the evidence relating to the felony conviction or the evidence about the 90 day sentence. Defendant cannot now be heard to complain in this regard."

LYONS, P.J., and BRYANT, J., concur.

No. 51317

| | |
|---|---|
| ESTATE OF SADIE JULIA ROSS, Deceased. | |
| ANNA M. PETERS, also known as ANNA M. ROSS, as Executrix of the Estate of John J. Ross, deceased, Petitioner-Appellant, | APPEAL FROM THE CIRCUIT COURT OF |
| vs. | COOK COUNTY, |
| ALBERT M. WERNER and HAROLD E. CORNUE, Executors under the Will of Sadie Julia Ross, deceased, et al., Respondents-Appellees. | PROBATE DIVISION. |

MR. PRESIDING JUSTICE LYONS DELIVERED THE OPINION OF THE COURT.

This appeal arises from a petition under Section 72 of the Civil Practice Act originally brought by petitioner, John J. Ross, since deceased, which sought to vacate and set aside an order of the Circuit Court of Cook County, approving the final account in the estate of Sadie Julia Ross, deceased. The petition was predicated upon the theory that the respondents, Albert H. Werner and Harold E. Cornue, as executors for said estate, fraudulently and in violation of their fiduciary duty, abated a portion of petitioner's specific legacy for the payment of Federal Estate Taxes, contrary to the provisions of Section 291 of the Probate Act.

The instant appeal is taken by petitioner-appellant, Anna M. Peters as executrix of the estate of John J. Ross (the original petitioner), from the entry of two adverse orders by the court below; to wit, (1) from an order entered on January 6, 1966, which upon the motions of the respondent-appellees, denied and dismissed with prejudice petitioner-Ross' amended and supplemental petition to vacate the court order of January 16, 1964, approving the final account of said respondents as executors for the estate of Sadie Ross, deceased, and (2) from an order entered on February 4, 1966, which denied petitioner-Peters' petition to

vacate the aforesaid adverse order of January 6, 1966 and which likewise denied petitioner leave to file a second amended and supplemental petition to vacate the aforesaid order of January 16, 1964, closing the estate of Sadie Ross, deceased.

As indicated, this cause comes before us on the pleadings only. No testimony was heard nor evidence received by the court below. Appellant's verified amended and supplemental petition to vacate having been subjected to motions to strike and dismiss by both respondents, however, this court may accept as true those allegations of fact well pleaded in such petition, together with all the inferences which may be reasonably drawn therefrom. Miller v. Veterans of Foreign Wars of U.S., 56 Ill. App.2d 343, 206 N.E.2d 316 (1965), Biller v. Allis Chalmers Mfg. Co., 34 Ill.App.2d 47, 180 N.E.2d 46 (1962). Based upon such pleadings, as well as the arguments tendered on appeal, a brief chronology of the events which gave rise to this cause appears as follows:

January 17, 1962: The testator, Sadie Ross, sister to the original petitioner John J. Ross, died.

March 26, 1962: The Last Will and Testament of Sadie Ross was duly admitted to probate, naming respondents Cornue and Werner, as co-executors, the latter being an old friend of the testator and a licensed attorney of the State of Illinois. Among numerous other provisions of her will, the testator bequeathed:

> "SECOND: To my brother, John J. Ross, . . . if he shall be living at the time of my death, I bequeath all shares of capital stock of Sears Roebuck and Company which I may own at the time of my death. . . ."

For purposes of this appeal, it is uncontested that the above bequest created a specific legacy in John Ross. The will, in addition to the specific bequest to the original petitioner, contained numerous other specific as well as general pecuniary

legacies and the standard residuary clause. The will, however, contained no provisions for the payment of taxes, more specifically, Federal Estate Taxes.

May 4, 1964: The respondents filed with the court the estate inventory which, among other assets, listed 2,755 shares of Sears common capital stock, at a value in excess of $200,000.00, as being owned by the testator on the date of her death.

Thereafter, during the subsequent administration of the estate that followed, respondents sold 630 shares of the Sears stock bequeathed to the original petitioner for the pro rata (amongst beneficiaries) payment of Federal Estate Taxes due and owing. Similarly, an additional 200 shares of such stock were retained by respondents pending an audit and approval of their Federal Estate Tax Return by the Internal Revenue Service. A subsequently discovered deficiency necessitated that 90 shares of such retained stock be liquidated, the balance of 110 shares being eventually distributed to petitioner.

January 16, 1964: The respondents filed with the court appearance and consent agreements, together with signed receipts for value received, from all of the distributive beneficiaries including petitioner, John Ross. Of even date, the trial court entered its order of approval of the respondents' final account without exceptions or objections being made thereto by any distributee.

April 10, 1964: As of this date, petitioner Ross averred to having first become cognizant of the alleged misconduct of respondents.

July 14, 1964: The original petition of John Ross was filed, which petition sought to vacate and set aside the order approving the final account.

August 3 and 18, 1964: The respective motions of

respondents, Cornue and Werner, were filed seeking to strike and dismiss Ross' petition to vacate.

September 15, 1964: The trial court entered an order sustaining respondents' motions to strike and dismiss the petition to vacate.

September 29, 1964: Petitioner Ross, by leave of court, filed a motion for leave to file instanter an amended and supplemental petition to vacate. The hearing on that motion, thereafter, was continued generally from time to time.

October 26, 1964: Petitioner Ross died, his death being suggested of record on December 22, 1964.

June 4, 1965: The instant petitioner, Anna Peters as executrix of the estate of John Ross, deceased, by leave of court, filed an amended and supplemental petition to vacate the order approving the final account, which petition prayed that an additional 19 parties respondent be joined in the action as distributive general legatees to answer to a claim for unjust enrichment.

July 9, 1965: Respondents filed their respective motions to strike and dismiss the amended and supplemental petition to vacate.

January 6, 1966: The trial court sustained respondents' motions to strike and dismiss said petition to vacate and thereafter denied petitioner's motion for a one week continuance to prepare a second amended and supplemental petition to vacate. An order was entered accordingly.

January 25, 1965: Petitioner Peters filed a motion to vacate the aforesaid order of January 6, 1966 dismissing her amended and supplemental petition to vacate with prejudice.

February 4, 1965: The trial court entered an order denying appellant's petition to vacate the aforesaid order of January 6, 1966, and similarly denying appellant leave to file

instanter a second amended and supplemental petition to vacate the order approving the final account.

It is the appellant's theory of the case (1) that respondents, as executors and fiduciaries, breached their duties of good faith and fidelity by fraudulently representing to John Ross that his specific legacy was subject to the pro rata payment of Federal Estate Taxes contrary to the provisions of Section 291 of the Probate Act; (2) that, in fact, no portion of the Ross legacy need have been abated to fully satisfy this tax liability; (3) that the appearance and consent agreement and receipt signed by Ross were obtained in reliance upon the misrepresentations of his fiduciaries and hence cannot operate as an estoppel to his action; (4) that as a consequence of such fraud, the trial court had jurisdiction under Section 72 of the Civil Practice Act and Section 290 of the Probate Act to vacate its order approving the final account; and (5) that it was an abuse of discretion for the trial court to deny appellant leave to file a second amended and supplemental petition to vacate.

It is the appellees' theory of the case (1) that they had, at all times, acted in good faith during the administration of the estate; (2) that petitioner has an adequate remedy at law against the general pecuniary legatees for unjust enrichment; (3) that petitioner is estopped from denying the correctness of the final account by virtue of his consent thereto and respondents' reliance thereon; (4) that under the holding of In The Matter of Estate of Togneri, 296 Ill.App.33, 15 N.E.2d 908 (1938), the court should refuse to open up the estate, nor can this rule be circumvented by petitioner's appeal to the court's equitable powers; and (5) that neither the amended nor second amended and supplemental petition avers facts, sufficient as a matter of law, to support a vacation of the final order closing the estate.

Respondents do not deny that they acted in a fiduciary capacity toward petitioner, nor that they erred in abating, pro rata, 720 shares of petitioner's specifically bequeathed stock to satisfy the estate's tax liability. Respondents offer to have been guilty only of an innocent misconception of the law governing priorities of abatement. The final account, itself, evidences such a misapplication. The listed costs of administration, claims allowed against the estate, and Federal Estate Taxes paid represented a sum liability, which could have been entirely discharged out of funds which were then on hand by way of cash on deposit and cash from the liquidation of nonspecifically bequeathed securities without having exhausted entirely the aggregate value of the general pecuniary legacies. See Ill.Rev.Stat. (1963) Chap. 3, par. 291.

It consequently appears that there exists but four genuinely disputed issues in the case; to wit, (1) whether the alleged conduct of respondents was such that the trial court could exercise jurisdiction under Section 72 of the Civil Practice Act, and if so, to what extent, (2) whether the receipt and appearance and consent agreements operate to estop petitioner from denying the authenticity of the final account, (3) whether the amended and supplemental petition is sufficient, as a matter of law, to support a vacation of the court's order of approval, and (4) whether the trial court abused its discretion in denying petitioner leave to file a second amended and supplemental petition to vacate.

Respondents, quoting extensively from the case of In The Matter of Estate of Togneri, supra, charge laches by petitioner and endeavor to impress this court with some basic tenet to the effect that a Probate Court will not open up an otherwise closed estate once the then applicable statutory relief period has elapsed. Respondents cite that the instant petition

was not filed until some 16 months subsequent to the entry of the order which it sought to vacate. We cannot concur in this viewpoint.

The petition to vacate was filed pursuant to Ill.Rev. Stat. (1965) Chap. 110, par. 72, which provides the exclusive mode of relief from the entry of a final order available to an aggrieved litigant after the expiration of 30 days from the date of such entry. 55 Illinois Bar Journal 820 (1967). The pertinent language of that statute provides:

> (1) Relief from final orders, . . . after 30 days from the entry thereof, may be had upon petition as provided in this section. Writs of error coram nobis and coram vobis, writs of audita querela, bills of review and bills in the nature of bills of review are abolished. All relief heretofore obtainable and the grounds for said relief heretofore available, either at law or in equity, whether by any of the foregoing remedies or otherwise, shall be available in every case, by proceedings hereunder, regardless of the nature of the order, . . . from which relief is sought or of the proceedings in which it was entered. . . .
>
> (3) The petition must be filed not later than 2 years after the entry of the order, . . . . Time during which . . . the ground for relief is fraudulently concealed shall be excluded in computing the period of 2 years. . . .
>
> (6) Any order entered denying or granting any of the relief prayed in the petition is appealable. . . .

Thus, all of the post-judgment relief has been succinctly merged into and is governed by this one statute. Respondents do not quarrel, but do maintain that petitioner's appeal to equitable jurisprudence has no application under a Section 72 petition. We feel that appraisal is incorrect. Calling respondents' attention to the hallmark decision of Ellman v. De Ruiter, 412 Ill.285, 106 N.E.2d 350 (1952), the court there interpreted Section 72 petitions as not being restricted to the narrower confines of its common law antecedents. Such petitions were, moreover, construed as addressing themselves to the broad equitable powers of the court, their use by the Ellman court being not only permitted,

but encouraged, to meet novel situations wherever such is consonant with the history of its common law and chancery practice predecessors.

The resulting effect of a Section 72 petition is to afford the court to which application is made an opportunity to balance the shroud of finality of its judgment against traditional concepts of doing justice to the parties concerned, hence the inapplicability of such steadfast rules as those promulgated in In The Matter of Estate of Togneri, supra, and cases cited therein. The language of the statute imports no intention that an exception should be made in the case of final orders closing probated estates, nor do we intend to create one. Cf. In re Estate of Tarpey, 322 Ill.App.270, 54 N.E.2d 222 (1944); In re Estate of Kinsey, 261 Ill.App.481 (1931); and Trego v. Estate of Cunningham, 267 Ill.367, 108 N.E.350 (1915). There would furthermore appear no apparent reason why the philosophy of the Ellman decision should necessarily be limited to judgment by default or pro confesso situations. 55 Illinois Bar Journal at page 830 (1967).

Under the language of Section 72(2) of this same statute, the filing of a petition to vacate gives rise to the commencement of an entirely new cause of action, and not unlike the rules of practice governing the ordinary complaint, it must plead facts upon which relief can be predicated. Accordingly, respondents submit that notwithstanding the admissions inherent in their respective motions, the instant petition is devoid of any well pleaded facts upon which relief could be granted. They focus, in particular, upon what they claim to be numerous conclusions of the pleader relative to her accusations of fraud. An examination of that pleading however, compels this court to reach a contrary conclusion.

Our reasons are clear. Section 290 of the Probate Act

[Ill.Rev.Stat. (1963) Chap.3, par.290] provides the substantive grounds, relative to the availability of relief for the implementation of a Section 72 petition. That statute provides, in part:

> ". . . If the account is approved by the court upon the hearing, in the absence of fraud, accident, or mistake, the account as approved is binding upon all persons to whom the notice was given. . . ." [Emphasis supplied]

Save the extraordinary situations of fraud, accident, or mistake, an executor who has given proper notice to all the interested parties and has, in due course, been discharged by the Probate Court is said to be functus officio and can no longer be sued personally in that capacity. Lewis v. West Side Trust & Sav. Bank, 376 Ill.23, 32 N.E.2d 907 (1941); Stade v. Stade, 315 Ill. App.136, 42 N.E.2d 631 (1942).

Of significant precedent in this connection is the case of Broodeen v. Gustus, 24 Ill.App.2d 334, 164 N.E.2d 288 (1960) wherein application by petition to vacate was made to this substantive provision of Section 290 under facts bearing a striking resemblence to the instant case. The action was brought by the administrator of the estate of the original petitioner to vacate a prior court order allowing a claim (a demand note) against the estate of the deceased maker thereof. Petitioner was an heir at law to the estate. There, as in the case at bar, the petitioner entered an appearance and consent to the allowance of the claim upon the strength of which the court thereafter entered its final order of approval. The petition to vacate was not filed until approximately three years thereafter. Subsequently respondents filed motions to dismiss, which motions were sustained, and an appeal was eventually taken. Reversing and remanding for a hearing on the merits of that petition, the court in Broodeen stated:

> ". . . the . . . Probate Court, . . . in the

> administration of estates has equitable jurisdiction and may set aside the previous order or judgment if the entry of such was procured by fraud or was due in any way to accident or mistake."

It thereby becomes incumbent, under the applicable law, that the test of the instant petition should not have been limited to a fraud theory, but rather should have been open to the reasonable alternatives of accident or mistake. Such recourse is expressly made available under Section 72(1). Without detailing the allegations to which we make reference, suffice to say this court is of the opinion that the averments contained therein were sufficient, if true as a matter of law, to support any of the three bases of recourse made available by Section 290, through the provisions of Section 72(1).

We, moreover, consider the requisite factual allegations of a Section 72 petition to have been satisfied. The petition avers facts which were neither of record nor litigated in the Probate Court, facts, which if true and known to the trial judge, would have prevented him from approving the final account as tendered. These facts have been alleged to have existed at the time of the entry of the order of approval, and furthermore were not presented below as a consequence of the averred misconduct of the fiduciaries upon whose representations petitioner claims to have relied. Ellman v. De Ruiter, supra; Brockmeyer v. Duncan, 18 Ill.2d 502, 165 N.E.2d 294 (1960).

Nor is petitioner chargeable with laches or want of reasonable diligence in bringing his grievance forthwith. Aside from several mitigating circumstances which appear of record, the rule has long been that mere delay alone will not bar relief where the aggrieved party was ignorant of the wrongdoing and filed his action within a reasonable time after his discovery thereof. This rule would especially be held to apply where, as here, the adverse party fails to show wherein he is prejudiced

by the delay. Brubaker v. Could, 34 Ill.App.2d 421, 180 N.E.2d 873 (1962). In any event, the instant petition was filed well within the two year statutory period provided in Section 72.

Fraud, accident, and mistake are, in and of themselves, well established grounds for equity jurisdiction, Broodeen v. Custus, supra, hence an absence of merit in respondents' contention that there exists an adequate remedy at law against the general pecuniary legatees for unjust enrichment. Here there is involved 19 such legatees, 11 of whom are nonresidents of the State of Illinois. It is an equally well established principle that, even when a money judgment is sought, where the claims involve a common set of facts, equity jurisdiction properly attaches to afford the more efficient of the remedies and to avoid a multiplicity of law suits. Jay-Bee Realty Corp. v. Agricultural Ins. Co., 320 Ill.App. 310, 50 N.E.2d 973 (1943).

We similarly cannot accept respondents' contention that petitioner was estopped, as a matter of law, from denying the authenticity of their final account to which he had previously acquiesced. That question raises necessarily a bona fide factual issue relative to the propriety of the manner in which the would-be waiver was procured, a determination we are not empowered to make. It is an issue, it might be added, which is part and parcel of the very theory of the case in chief; namely, fraud, accident, or mistake by the executors. Petitioner was entitled to a hearing on the merits of her prayer for relief so that she might be afforded an opportunity to offer evidence in support thereof.

Lastly, we are called upon to determine whether it was an abuse of discretion for the trial court to deny petitioner leave to file a second amended and supplemental petition to vacate. Petitioner, in support of her contention, cites a bevy of cases to evidence the liberal application afforded requests to amend by the courts. Petitioner, likewise, charges that the

trial judge exercised no discretion whatsoever in summarily denying leave to amend without having first considered the additional averments of the amended petition. (The additional facts were, for the most part, letters written by respondent Werner to John Ross.)

We cannot give countenance to such an argument. It appears that those "additional detailed facts" were merely a restatement of the allegations already determined by the court, as well as an attempt to incorporate evidence into her pleadings. Such additional averments would moreover appear to have been facts admissible under the language of the amended petition in its then existing state. Petitioner, accordingly, cannot be said to have been prejudiced thereby. The tendered second amended and supplemental petition, hence, was properly refused.

For the above reasons, the order of January 6, 1966, striking and dismissing petitioner's amended and supplemental petition to vacate is reversed and the cause remanded with directions to proceed in a manner not inconsistent with this opinion. The order of February 4, 1966, denying petitioner leave to amend is affirmed.

REVERSED IN PART AND
AFFIRMED IN PART.

BURKE, J., and BRYANT, J., concur.

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|---|---|---|
| PEOPLE OF THE STATE OF ILLINOIS, Appellee, | ) | APPEAL FROM THE |
| | ) | CIRCUIT COURT OF |
| vs. | ) | |
| | ) | COOK COUNTY, |
| JAMES YANCY (Impleaded), Appellant. | ) | CRIMINAL DIVISION. |

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

In a trial without a jury James Yancy was found guilty of burglary and sentenced to the penitentiary for a term of one to five years. From the judgment thereon he appeals.

The evidence established that Conrad Eckert of 6954 South Paxton Avenue, Chicago, went to Miami, Florida on July 18, 1965. When he left, he had furniture, money, a television set and some guns in his apartment. He did not give anyone permission to take any of these out of his apartment while he was absent. When he returned to the apartment on August 9, 1965 he found that the apartment had been broken into and that two guns and some old coins were missing.

Officer Thomas Faragoi of the Chicago Police Department testified that during the early afternoon of July 23, 1965, he and his partner responded to a call by going to 6954 South Paxton Avenue, Chicago. They arrived there at approximately 2:30 P.M., observed two males emerging from the court building; the second man was carrying a portable television set. The first man was in a vehicle parked in the street. Officer Faragoi identified the defendant James Yancy as the first man. Both men were placed under arrest and searched.

Jamison Sanders, the man carrying the television set, also had two revolvers, one in each front pocket. Conrad Eckert identified these guns as his own. The television set carried by Sanders was returned to Eckert's son-in-law on the scene at the apartment.

Eckert testified that he owned the television set. Yancy was searched and in his rear pocket a handkerchief with several coins was found. The coins taken from Eckert's apartment were old coins, like Mexican and German coins, that he had picked up and he identified the coins taken from Yancy as of the same type and nature. The defendant was taken to the station where he was asked to explain his presence at the scene. He stated that he was looking for his girlfriend at 69th and Kingston. There is no such location. At the time of his arrest defendant denied knowing Jamison Sanders and he denied committing the burglary. Jamison Sanders was then brought into Yancy's presence and he stated that he knew Yancy. On cross-examination Officer Faragoi stated that he made a mistake in the report where it said that the second offender was apprehended as he attempted to drive away from the scene, since, in fact, the defendant was just outside of the vehicle on the driver's side attempting to get into his car when he was arrested. He further explained that a supplementary report with similar language to the original report was made by an officer making a follow-up investigation who relied upon the original report for his information. The officer who made the supplementary report was not at the scene.

The defendant's evidence consisted of his own testimony. He stated that on the date in question he drove a lady he did not know from a bar on 43rd Street to the scene. He testified that there the lady got out of the car and told him that she would be back in five or ten minutes and that he should wait for her. He sat there for four or five minutes with the motor running when the police appeared on the scene. He was forced out of the car by a gun and searched. Nothing was found on him. At the police station the defendant claims the officer told him that he was going to send

him to the penitentiary by saying that coins were found in defendant's pocket. He claimed that the officer's words were, "We're going to railroad you to the penitentiary." On cross-examination, defendant stated that he had never seen the woman before and that after his release on bond he had not gone back to the tavern or to the building where he let her off in an attempt to find her. He did not remember which building she had gone into. He claimed he asked the officers to wait until the lady came back. When asked as to which officer he made the request, he stated the officer who was not present in court. He testified that he never got out of the car and that he did not have a handkerchief in his back pocket. He said that Jamison Sanders told the police that the coins were not defendant's.

In rebuttal, the People introduced Officer Forberg. He was present with Officer Faragoi when the arrest was made. Officer Forberg testified that when he first saw the defendant the latter was not in his car, he was walking. Defendant did not tell him that he was waiting for a woman he had driven to the scene but stated that he was looking for his girlfriend who lived in the area. He did not know her address. Officer Forberg further testified that defendant did not ask him to wait for the return of anyone and that his partner took the coins from defendant's rear pocket. Forberg denied that either he or anyone else threatened to "railroad" defendant and denied that Jamison Sanders made the statement attributed to him by defendant. Officer Faragoi also took the stand in rebuttal, denied that anyone had threatened to "railroad" the defendant, denied that the defendant had told them he was waiting for a lady or had asked them to wait for her return and denied that Jamison Sanders had ever said the coins were his.

Defendant urges that the admission over objection of prejudicial hearsay denied him a fair trial. Defendant testified that

he did not know Jamison Sanders who was apprehended with a television set taken from the burglarized apartment. The alleged hearsay consisted of a statement made by Sanders to the effect that he knew Yancy. This statement was attributed to Sanders by Officer Faragoi. Sanders did not testify at the trial. Defense counsel objected to the testimony by Officer Faragoi but not on the ground that it was hearsay. The objection was that the questions asked by the State's Attorney were leading. Nowhere was there any objection that the testimony was hearsay. Since no objection was made that the testimony was hearsay, the defendant is not in a position to urge the point at this time. People v. Norman, 28 Ill. 2d 77; People v. Collins, 25 Ill. 2d 302, 304; People v. Washington, 23 Ill. 2d 546, 548.

Defendant argues that the testimony of Officer Faragoi who testified for the People is impeached by two police reports and demonstrated to be totally inconsistent and raises a serious doubt as to the veracity of the police witnesses. The evidence establishes without contradiction that a burglary occurred on July 18, 1965 and that a television set, two guns and a number of old coins were taken in the burglary. Two men were found at the scene of the burglary. These men had in their possession goods stolen in the burglary. The defendant Yancy was one of the two men. The discrepancy or claimed impeachment relied upon by the defendant arises from the testimony of the arresting officers as to whether the defendant was inside his car, getting into his car, or at his car at the time of the arrest. The original report of the arrest states that defendant was apprehended "as he attempted to drive away from the scene." A second report, which was based on the first report and made by a follow-up officer not present at the scene, had language of a similar

nature. Officer Faragoi, probably relying on the report to refresh his memory, testified on direct examination that the defendant was in a vehicle parked at the scene when he and his partner arrived on the scene. Later, as the case went on, Officer Faragoi recalled that when he first saw Yancy he was emerging from the courtyard and walking towards his vehicle. Faragoi stated that it took him five to seven seconds from the time he first saw the defendant to the time he saw the unmarked squad car and got out. By the time he had gotten out and ordered the defendant to hold it, Yancy was by his car and Faragoi arrested him outside the vehicle on the driver's side as he was attempting to get into the vehicle. We agree with the People that the important fact is that Yancy was found at the scene of the burglary with the fruits of the burglary in his possession and not whether he was half in, all in or not in the car at all at the time of his apprehension.

In a bench trial it is the function of the trial judge to determine the credibility of the witnesses and the weight to be afforded to their testimony. People v. Clark, 30 Ill. 2d 216. The finding of the trier of fact as to credibility of witnesses is entitled to great weight. People v. Hickock, 62 Ill. App. 2d 480. The determination of credibility of witnesses is a function of the trial court or jury which hears and sees the witnesses and is better able to evaluate the demeanor and weight to be afforded testimony than is a court of review. People v. Wysocki, 20 Ill. 2d 62. The determination as to the credibility of witnesses should not be disturbed unless clearly erroneous. People v. Buzinski, 64 Ill. App. 2d 194.

For these reasons the judgment is affirmed.

JUDGMENT AFFIRMED.

LYONS, P.J., and BRYANT, J. concur.

51843

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| WALTER M. BLOCK, Plaintiff-Appellant, v. ROBERT D. JESMER and ESTATE OF MILTON GERWIN, Defendants-Appellees. | ) ) ) ) ) ) ) ) | APPEAL FROM CIRCUIT COURT OF COOK COUNTY, PROBATE DIVISION. |

MR. JUSTICE DRUCKER DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a summary judgment finding the issues in favor of defendants and against plaintiff.

Plaintiff contends that questions of fact were presented by the affidavits and that therefore the court erred in entering the summary judgment.

On December 10, 1964, plaintiff filed a claim against the Estate of Milton Gerwin, one of the defendants. The claim was stricken with leave to file an amended claim. An amended claim was filed joining Robert D. Jesmer as a defendant and thereafter a second amended claim was filed. It alleged that on or about September 27, 1962, the plaintiff had retained the legal services of Gerwin and Jesmer to represent him in the case of Walter M. Block v. Daniel Betten and Ruth Betten Block in the United States District Court, Eastern District of Wisconsin; that on or about January 30, 1963, one of the defendants, Daniel Betten, died; that on or about July 1, 1963, a motion to dismiss was filed on behalf of the deceased and a certified copy of the death notice was attached to the motion; that on May 11, 1963, plaintiff wired his attorneys urging them to amend the complaint by adding Betten's estate as a party; that subsequently Gerwin died and Jesmer withdrew as attorney in June or July, 1964; that Gerwin and Jesmer had negligently failed to amend the complaint and that on August 10, 1964, a federal judge dismissed the case for

failure to substitute the executors of the Estate of Betten as required by Rule 25(a) of the Rules of Civil Procedure of the United States District Court;[1] that thereafter the case was dismissed as to the other defendant; that plaintiff was free of contributory negligence and had been injured in the sum of $174,000.

On March 16, 1966, defendants jointly moved for summary judgment and on March 28, 1966, the motion was denied by Judge Goldstein whose order stated:

> IT IS HEREBY ORDERED that the motion of the defendants for Summary Judgment be and the same is hereby denied, said ruling being based upon the order of Judge Poos (Page 9 of transcript filed herein) dismissing plaintiff's Complaint against DANIEL BETTEN for failure to comply with Federal Rule 25(a)1, and that said order raises a question of fact as to said dismissal.

On June 6, 1966, Jesmer alone filed a motion for summary judgment accompanied by his affidavit which alleged that he was one of the attorneys in the Federal Court case; that no "statement of fact of death" was ever served; that on July 1, 1963, the attorneys who had been representing Daniel Betten filed a motion to dismiss commencing as follows:

> Defendant Daniel Betten by Merrill M. Rogoff, Erwin L. Goldfine and Yetta B. Betten, Co-Executors of the Estate of Daniel Betten, . . . .

that by filing this motion the executors voluntarily appeared

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1. Rule 25(a)(1).
   If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons, and may be served in any judicial district. Unless the motion for substitution is made not later than 90 days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party.

and submitted to the jurisdiction of the court; that on August 10, 1964, two months after the withdrawal of Jesmer, the Federal Judge raised the question of non-compliance with Rule 25(a)(1) and dismissed the case as to Daniel Betten; that plaintiff moved to vacate the dismissal on the ground that the estate had appeared and submitted itself to the court's jurisdiction; that the court refused to reverse its ruling stating that plaintiff had failed to comply with Rule 25(a)(1) and that plaintiff had voluntarily dismissed his suit;[2] that the court erred in dismissing Betten for failure to comply with Rule 25(a)(1); and that plaintiff should have appealed the ruling.

In his counter-affidavit plaintiff states that the certificate of Betten's death filed with the motion to dismiss in the Federal Court was notice to Gerwin and Jesmer especially since they argued in opposition to the motion; that failure to heed his telegram of May 11, 1963, plus additional demands before and after said date urging the filing of an amended complaint in compliance with Federal Rule 25(a)(1) constituted negligence; that the Circuit Court has no power to review or over-rule the Federal Court order and that he had no duty to appeal that order.

In the case of Des Plaines Motor Sales, Inc. v. Whetzal, 58 Ill. App. 2d 143, 148, the court said:

> A motion for summary judgment should be denied if upon examination of the record it can be fairly said that a triable issue of fact exists. (Citing cases.)

The duties and responsibilities of lawyers were set out in Olson v. North, 276 Ill. App. 457, at page 473:

> "When a person adopts the profession of law, if he assumes to exercise the duties in behalf of another for hire and reward, he must

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2. After the Federal Judge dismissed Daniel Betten, plaintiff dismissed the suit as to the other defendant.

> be held to employ in his undertaking a reasonable degree of care and skill. If injury result to the client from the want of such a degree of reasonable care and skill, he must respond in damages to the extent of the injuries sustained. It is the duty of an attorney to bring to the conduct of his client's business the ordinary legal knowledge and skill common to members of the legal profession, to act toward his client with the most scrupulous good faith and fidelity, and to exercise in the course of his employment that reasonable care and diligence which is usually exercised by lawyers."

A question is presented in this case as to whether plaintiff's attorneys in the federal case were negligent in relying upon a motion to dismiss made by "Daniel Betten by . . . Co-Executors of the Estate of Daniel Betten" instead of substituting the Estate of Daniel Betten, Deceased, for Daniel Betten, the defendant, in that case within the time required in Federal Rule 25(a).

In O'Neill v. Gray, 30 F.(2d) 776, (cert. den. 279 U. S. 865) plaintiff as administratrix of the estate of her deceased brother sued defendant, an attorney-at-law, to recover damages for his negligent prosecution of her cause of action against the firm of H. H. Vought & Co. for the death of her brother. The complaint named H. H. Vought & Co. as a corporation. A verified answer was signed: "Henry H. Vought, partner of H. H. Vought & Co." Vought's attorneys also served a letter stating that H. H. Vought & Co. was a co-partnership and not a corporation. Defendant's attorney was of the opinion that the answer amounted to a general appearance on the part of the co-partnership and subsequently (after the time within which to file suit had expired) obtained leave of court to amend the complaint to charge the co-partnership. This ruling, however, was reversed and the original action fell. In affirming a judgment for plaintiff the court stated on page 780:

> Last, it was suggested during the argument that there was no proof of negligence in the management of the litigation by defendant's associate, because there was fair reason to believe that the plaintiff could amend the com-

> plaint, so as to recover against the partnership of H. H. Vought & Co., because of their appearance in the action. Perhaps the decision of the Special Term, permitting such an amendment nunc pro tunc, tended to bear out this contention. Gray v. H. H. Vought & Co., 126 Misc. Rep. 33, 212 N.Y.S. 511. But the point was doubtful, was in the end decided against the plaintiff, and could have been eliminated from the case by prompt action. The Appellate Division reversed the order allowing the amendment, both on the law and because of laches. Gray v. H. H. Vought & Co., 216 App. Div. 230, 214 N.Y.S. 765. . . . The Court of Appeals dismissed the appeal by a divided court, because one ground of the decision below involved the exercise of discretion. Gray v. H. H. Vought & Co., 243 N.Y. 585, 154 N. E. 615. Skillful conduct involves avoidance of wholly unnecessary risks. We think it was properly left to the jury to say whether the conduct of the litigation was reasonably skillful. [Emphasis supplied.]

The dismissal by plaintiff of his suit after the Federal Judge had dismissed Betten is not relevant to the determination of whether the attorneys were negligent in not substituting parties. It may be an element to be considered when the amount of damages comes to issue.

Additionally, when an attorney fails to follow the explicit instructions of his client, his conduct raises a triable issue. See 45 ALR 2d p. 17 (c).

We find that since there were triable issues of fact it was error to enter the summary judgment in favor of defendant Jesmer.

We next consider the propriety of the summary judgment in favor of the Estate of Milton Gerwin. The record discloses that both defendants jointly filed a motion for summary judgment on March 16, 1966, which was denied on March 28, 1966. Thereafter plaintiff filed a second amended claim and the Estate of Milton Gerwin filed an answer on May 23, 1966, raising issues of fact. Jesmer filed no answer but on June 6, 1966, did file a motion for summary judgment on his own behalf only. The trial court on July 26, 1966, entered a summary judgment in favor of both defendants although it based its findings on the motion filed by

Jesmer alone.[3] This was erroneous since the case was at issue between plaintiff and the Estate of Gerwin and no motion for summary judgment had been made on behalf of the estate.

The judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

English, P.J., and McCormick, J., concur.

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3. The order of July 26, 1966, read:

> This cause came up for hearing on the motion for summary judgment and the affidavit and records in support thereof heretofore filed by defendant, Robert Jesmer, the Court having fully considered the arguments of all parties and the written briefs filed by plaintiff Walter Block and defendant Robert Jesmer and having considered all matters in the file of this court, this court after first orally expressing doubts as to the jurisdiction of this court to hear this unliquidated negligence claim nonetheless stated that summary judgment should be granted in favor of defendants. It is therefore ordered that this court finds the issues in favor of defendant Robert Jesmer and defendant Estate of Milton Gerwin - and against plaintiff Walter Block and it is further ordered that plaintiff Walter Block go hence without day.

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| PEOPLE OF THE STATE OF ILLINOIS, Appellee, | APPEAL FROM THE |
| vs. | CIRCUIT COURT OF |
| EDWARDELL NOBLE, Appellant. | COOK COUNTY, CRIMINAL DIVISION. |

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

In a bench trial Edwardell Noble was found guilty of the robbery of Paul Parenteau and sentenced to serve a term of one to four years in the penitentiary. He appeals.

Paul Parenteau testified that at about 1:30 on the morning of September 14, 1965, he was in a tavern in the vicinity of 1048 W. Leland Avenue, Chicago. He ordered a beer. The co-defendant, Charles Porter, struck up a conversation with Parenteau and suggested that they shoot dice. Parenteau declined. Porter finally prevailed and the two went outside and rolled dice in a nearby hallway. Porter lost and asked to borrow a dollar. Parenteau refused saying that it was "crazy" to loan anyone money to gamble against his own money. He then offered to buy Porter a drink. The two returned to the tavern where Parenteau bought drinks and shortly thereafter left.

After Parenteau left the tavern he was accosted by four men at the mouth of a nearby alley. He was pushed, knocked down and jostled. He received a bump on the head, was pushed up against the wall and the men spread his legs and threatened to kick him. Parenteau identified the three defendants, Charles W. Perry, Charles T. Porter and Edwardell Noble as three of the men. Perry was in front of Parenteau and Porter and Noble were on each side of him. They took his wristwatch, some keys and about $80. The next thing Parenteau knew, the defendants were running and the police were there. Parenteau told the police he had been robbed and they pursued the men. The officers apprehended the three defendants within the immediate area and Parenteau identified Perry,

Noble and Porter at the scene. He also identified his watch as the watch that was taken. Police Officer Matthew Barker testified that he and his partner, Leroy Wandtke, were cruising in their squad car when they saw four men beating and apparently robbing a fifth man in an alley. When they first observed the incident, they were about 100 feet away. They then drove their squadrol into the area and were about fifty feet away when the four men ran. The victim, Parenteau, who when they first saw him was on his back, had bruise marks about his face and head. He immediately told the officers that he had been robbed. Officer Barker apprehended Noble about 20 feet from the scene in a gangway at the rear of 1054 W. Leland Avenue. Parenteau identified Noble as being one of the men at the scene. Officer Barker observed his partner apprehend Porter. Officer Barker then found the other co-defendant, Perry, hiding under a truck. Parenteau also identified him. The defendants were searched at the police station and Parenteau's keys and watch were recovered from Perry and $41 was found in Porter's possession. The watch was received in evidence without objection.

Porter testified that he and another man were shooting dice this night and that Parenteau walked up to them and asked them where he could locate a woman. Porter told him he did not know. Parenteau left and went to a tavern. Porter left the game a short time later and went to the same tavern where he had a few drinks with Parenteau. After some discussion the two men left to shoot dice. Noble was in the game. Perry came up and watched the game but did not join in. Parenteau was losing and prevailed upon Porter to loan him $5.00 with his watch as security. Parenteau lost again and prevailed upon Perry for a loan of $20. The police arrivedand everybody ran. Porter denied being engaged in a fight or robbing Parenteau.

Perry testified that he came upon the dice game while it was in progress but did not join. Parenteau was losing and asked Perry for a loan of $20 for which he gave his keys as security. He denied he ever had Parenteau's watch in his possession. The police arrived and every one ran. Perry denied both the fight and the robbery.

Noble, the appellant, testified that he engaged in a dice game with Parenteau, Porter and another person. Perry was there but not playing. Parenteau was losing and prevailed upon Perry for a loan of $20. Noble heard the word "collateral" used in the discussion between Perry and Parenteau. Noble denied that a fight took place and denied the robbery. He stated that the only physical contact between the players was when they began to run when the police arrived and they collided with each other.

In rebuttal Officer Wandtke testified that the keys and wristwatch were found on Perry at the police station and at the time Perry accused the officer of "planting" the items. Officer Wandtke testified that Perry did not say anything about the items being a security for a loan. The defendants all denied knowing each other or of knowing Parenteau. Officer Wandtke said that the defendants did not say anything about a dice game. Also in rebuttal for the purpose of impeaching the defendants, the People introduced the defendant's prior felony convictions. These show that Noble, appellant herein, had been convicted of theft and sent to the Texas Penitentiary for five years in 1955; that Porter was convicted of armed robbery in 1962 and sentenced to one to five years in the Illinois State Penitentiary and that Perry was convicted of larceny in 1961 and sentenced to three to five years in the Illinois State Penitentiary. The three defendants were found guilty and each sentenced to one to four years in the penitentiary. The instant appeal concerns the defendant, Edwardell Noble.

He asserts that he was prejudiced by the improper admission into evidence of the money, watch, and keys. Defendant states that Parenteau testified that he was robbed of about $80 but points out that the police found only $41. Noble says that the money found on Porter was half the amount of which Parenteau allegedly had been robbed. People's Exhibit No. 1 consisted solely of Parenteau's wristwatch. The money and keys were not introduced into evidence. When the People offered the wristwatch into evidence as Exhibit No. 1 the court asked defense counsel if he had any objection and he answered, "No." He cannot now complain of admission of People's Exhibit No. 1. See People v. Witherspoon, 27 Ill. 2d 483, 492; People v. Collins, 25 Ill. 2d 302, 304; People v. French, 33 Ill. 2d 146, 149. People's Exhibit No. 1 was identified by Parenteau as his watch. He further testified that the watch was taken in the robbery. Officer Barker identified People's Exhibit No. 1 as a wristwatch that was recovered from Perry and which was identifed by Parenteau, thus connecting the watch with the robbers and the part defendant played in the robbery. In our opinion the People produced evidence which identified the watch as being part of the fruits of the robbery and sufficiently laid a foundation for its admission.

Defendant asserts that he was not proven guilty beyond a reasonable doubt. This defendant was identified by Parenteau both at the scene of the robbery and at the trial. He testified that he was kicked and beaten and that his property was taken from him. The police officers observed four men beating and apparently robbing the victim. On the approach of the police officers the men fled. When the officers came up to the victim he had bruise marks about his face and head. Noble, the appellant, denied that he committed a robbery. He admitted

that he was one of the men in the group observed by the officers and that he ran when the police came. There was a positive identification by Parenteau, corroborated by the testimony of the two police officers. The elements of the crime of robbery were shown. The identification of the wristwatch and its connection with the defendant in the part he played in the robbery was shown. The defendants gave the only testimony in their own behalf. It is the province of the trial court to determine the credibility of the witnesses and the weight to be accorded their testimony and the court's judgment will not be disturbed unless it is based on unsatisfactory and improbable evidence which leaves a reasonable doubt of defendant's guilt. People v. Neiman, 30 Ill. 2d 393; People v. Gray, 33 Ill. 2d 349.

We do not find any reversible error. Therefore, the judgment against Edwardell Noble is affirmed.

JUDGMENT AFFIRMED.

LYONS, P.J., and BRYANT, J. concur.

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| ROY JOHNSON, Plaintiff-Appellant, | ) | APPEAL FROM |
| vs. | ) | CIRCUIT COURT |
| MADELIENE LIPSKY, Defendant-Appellee. | ) | COOK COUNTY MUNICIPAL DIVISION. |

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

On November 30, 1966, a judgment was entered for plaintiff and against defendant in the amount of $3500. On December 13, 1966, the court allowed defendant's motion for a new trial. Plaintiff's petition for leave to appeal from this order was allowed. The defendant has not appeared or filed a brief in this court. Because of the failure of defendant to file a brief or argument, the order allowing the new trial is reversed and the cause remanded with directions to proceed in due course. Kavanaugh v. Washburn, 387 Ill. 204, 210; Ogradney v. Daley, 60 Ill. App. 2d 82; 541 Briar Place Corp. v. Harman, 46 Ill. App. 2d 1; C.I.T. Corporation v. Blackwell, 281 Ill. App. 504.

Order reversed and cause remanded with directions.

ORDER REVERSED AND CAUSE REMANDED WITH DIRECTIONS.

LYONS, P.J., and BRYANT, J., concur.

M-51647

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| ANGELO PERCIABOSCO, doing business as REX ELECTRIC SHOP, Plaintiff-Appellee, | ) | APPEAL FROM |
| v. | ) | CIRCUIT COURT, |
| ALBERT PRANNO, Defendant-Appellant. | ) | COOK COUNTY. |

MR. PRESIDING JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

Before trial, plaintiff voluntarily dismissed his action for labor and materials furnished by plaintiff, an electrical contractor, to defendant. Defendant appeals from the denial of his motion for the payment to him by plaintiff of reasonable expenses and attorney's fees, pursuant to section 41 of the Civil Practice Act. Defendant asserts the only question is, "Did the plaintiff make false allegations and carry on his action in bad faith, entitling defendant to reasonable attorney's fees?"

Plaintiff's complaint, filed September 1, 1964, alleged that he performed labor for defendant at defendant's request on or about June 14, 1955, for which defendant promised to pay plaintiff $434.63; that plaintiff demanded payment but defendant did not pay, and the sum was still due and owing to plaintiff.

The subsequent record includes: (1) A demand for a bill of particulars by defendant. (2) Plaintiff's detailed answer. (3) Defendant's motion to dismiss the action on the ground that it was barred by the Statute of Limitations, and that plaintiff, as a subcontractor, could not maintain an action at law against the owner, his contract being with the general contractor and not the owner. (4) An order denying defendant's motion to dismiss and directing defendant to answer. (5) Defendant's answer, which denied that he promised to pay plaintiff for the work, and which stated that the building was financed with a first mortgage loan, and that he [the defendant] on February 9,

1956, wrote a letter to Harold J. Friedman, attorney for the mortgagee, which stated: "Please issue check in the amount of $434.63 to the Rex Electrical Co., Angelo P. Bosco, owner, for electrical work satisfactorily completed at 5757 W. Belden Avenue." (6) A change of venue on defendant's motion. (7) Interrogatories by defendant and answered by plaintiff. (8) Motion by defendant for summary judgment grounded on the allegation that the action was barred by the Statute of Limitations. (9) An order denying this motion.

Defendant's motion, as amended, for the allowance of reasonable expenses and attorney's fees, pursuant to section 41, alleges plaintiff's complaint was without reasonable cause, untrue, and not in good faith. The motion sets forth a letter from plaintiff's attorney, dated June 10, 1965, informing defendant's attorney that plaintiff had suffered a "very severe stroke," which necessitated hospitalization and intensive care at home, all of which required a continuance for trial. The motion also states that the defendant, suspecting the plaintiff would again seek to delay the disposition of the case, telephoned plaintiff's home on May 31, 1966, and that the "plaintiff appeared to be in good physical condition, from what affiant could gather from his voice." Furthermore, when, on June 1, 1966, the plaintiff's attorney called for a further continuance because of the alleged bad health of the plaintiff, he was informed by the defendant's attorney that it had been ascertained that plaintiff was not ill. On June 2, 1966, when the case was called for trial, the plaintiff moved for a nonsuit, which was granted at plaintiff's costs.

Defendant contends that the charges made in his motion for attorney's fees, as amended, were not answered by plaintiff and stand as "unrefuted proof" that "the plaintiff's false allegations on which his action is unreasonably based are clearly established by his own contradictions in his answers to

interrogatories and his deposition. He failed to deny, and therefore admitted, defendant's charges of falsity."

A review of the authorities cited by both sides is unnecessary. In Greengard v. Cooper, 78 Ill. App.2d 86, 221 N.E.2d 775 (1966), it is said (p. 89):

> "Section 41 is an attempt by the legislature to penalize the litigant who pleads frivolous or false matters or brings a suit without any basis in law and thereby puts the burden upon his opponent to expend money for an attorney to make a defense against an untenable suit. * * * Allowance of attorney's fees under this section is discretionary. The trial court can exercise that discretion only when the record discloses evidence of bad faith on the part of the pleader."

From an examination of this record, we are not persuaded that plaintiff was obliged to file an answer to defendant's motion, as amended, for attorney's fees. The record substantially reflected the factual allegations made by defendant with the exception of his telephonic ascertainment of plaintiff's condition. Defendant's charge that plaintiff made false allegations without reasonable cause and not in good faith was a conclusion of defendant which did not call for a denial by plaintiff.

In stating his cause of action in his complaint, plaintiff was not required to anticipate and attempt to negative or avoid a possible defense that may or may not have been interposed, such as the Statute of Limitations. (Book v. Ewbank, 311 Ill. App. 312, 319, 35 N.E.2d 961 (1941).) Two different judges denied defendant's motion to dismiss and his motion for summary judgment. These orders of denial demonstrated that the plaintiff sufficiently alleged a cause of action and were based on the record on which defendant makes his charge of false allegations and bad faith. We note, also, that defendant's letter of February 9, 1956, directed payment to plaintiff of $434.63 "for electrical work satisfactorily completed," and nowhere in the record is it alleged or stated that plaintiff had been paid this amount by anyone.

We are not persuaded that the record in this case affords justification for a finding that the allegations in plaintiff's complaint were made "without reasonable cause and not in good faith, and found to be untrue." Such findings are requisite to relief under section 41. We conclude the trial court properly denied defendant's motion for relief under section 41.

Our conclusion makes it unnecessary that we rule on the motions that were taken with the case.

The order of the Circuit Court is affirmed.

AFFIRMED.

BURMAN and ADESKO, JJ., concur.

Abstract only.

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| PEOPLE OF THE STATE OF ILLINOIS<br>Defendant in Error | ) | APPEAL FROM WRIT OF ERROR<br>TO THE CIRCUIT COURT OF<br>COOK COUNTY, CRIMINAL DIVISION |
| vs. | ) | |
| JOHN EDDY (IMPLEADED)<br>Plaintiff in Error | ) | |

MR. JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT:

Richard Elkins and John Eddy were indicted in the Criminal Court of Cook County for burglary. Elkins requested and was granted a severance and pleaded guilty. Eddy pleaded not guilty and waived a trial by jury. He was found guilty of burglary and was sentenced to a term of not less than five years nor more than ten years in the Illinois State penitentiary.

The indictment consists of one count. That "they, without authority, knowingly entered into a building, to-wit: tavern of Ann Lawson, with the intent to commit therein a theft."

On August 30, 1962 at 3:30 a.m., the 2506 Club at 2506 North Lincoln Avenue, Chicago, Illinois, owned and operated by a partnership consisting of Ann Lawson, her husband David Lawson, and his brother Jessie Lawson, was broken into and two metal boxes and a cigar box were stolen. One of the metal boxes had a lock on it, the other did not. The three boxes together contained about $800.00 in currency and $1,200.00 in checks. The checks and one metal box were thrown out in a prairie in the 6600 block of Lincoln Avenue, Lincolnwood, Illinois. Richard Elkins was arrested within an hour after the checks and a metal box were thrown out of the car. When arrested, Elkins was in the car used in the burglary and a metal box was found under the right front seat of the car.

On September 4, 1962, David Lawson and his brother, Jessie Lawson, encountered John Eddy, also known as "J" or "Jay" Eddy, in a club and took him outside where he admitted to both of them that he and Richard Elkins committed the burglary. Eddy then told the Lawson men that he would help them recover their

checks and the defendant then guided the Lawsons to the exact place on Lincoln Avenue where one of the metal boxes, with the lock broken off, and about $463.00 worth of checks were recovered. Eddy was then turned over to the Chicago Police at which time he orally admitted to Officer Michaelsen that he and Elkins burglarized the tavern in question.

Defendant claims that the indictment for burglary is insufficient in that it only identified the premises charged to have been burglarized as the tavern of Ann Lawson. The defendant claims a variance between the evidence and the indictment as to the identification of the premises burglarized. The license to the tavern was issued in the name of Ann Carey, which was Ann Lawson's maiden name. The evidence was that the 2506 Club at 2506 North Lincoln Avenue, Chicago, Illinois, was burglarized. There was evidence that the business at the 2506 Club was conducted by Ann Lawson, her husband David Lawson, and Jessie Lawson, as co-partners. In The People v. Kreisler, 381 Ill. 453, p.457, 45 N.E.2d 653, it is stated:

> "The gravamen of the offense of burglary, as defined by the Criminal Code, is the intent with which the entry of the building was made."

This clearly indicates that it is sufficient identification where one of the partners of a partnership is mentioned as the owner and the ownership of the building is lawfully within the partnership.

In People v. Johnson, 20 Ill. 2d 336, p. 338, 169 N.E.2d 781, it is stated:

> "That requirement is satisfied here, and the proof conforms to the indictment. The testimony of the complaining witness that she lived with her brother-in-law, Dennis, and that they paid the rent together was sufficient proof of a possessory interest in Dennis. (People v. O'Brien, 404 Ill. 236, 239; People v. McCabe, 306 Ill. 183, 187.) The evidence shows that the defendant intended to steal anything of value that he could find, and that he was not concerned with niceties of legal title as between Rosalie Nelson and Dennis. The absence of proof that Dennis owned any property in the apartment is unimportant. 2 Bishop on Criminal Law, 9th ed., sec.114."

The fact that a partnership identification was sufficient to show the identity of the premises and the conformity of the indictment was held in People v. Kreisler, supra.

This matter was thoroughly discussed in People v.Stewart, 23 Ill. 2d 161, at 168, 177 N.E.2d 237, where the court said:

> "The premises involved are effectively identified, and the rights of the accused are fully protected by an indictment that charges the unlawful entry of a building in the possession of another. We hold, therefore, that the indictment in this case is sufficient."

It is claimed by the defendant that there was error committed by the judge in admitting Exhibit No.1 which was a metal box found under the seat of the robbery car not otherwise identified or connected with the robbery. It states in People v. Jones, 29 Ill. 2d 306,p.309, 194 N.E.2d 239:

> "The People's evidence shows that defendant and Frisco committed the robbery and there was sufficient evidence to connect the gun with them and with the crime to make it admissible against either of them, although it actually belonged to just one of them. People v.Pittman, 28 Ill. 2d 100."

This would seem to be ample authority for admitting the box into evidence as it was clearly found in the robbery car and where the defendant had ample opportunity to place it.

It is next contended by the defendant that the Court erred in giving consideration to the testimony of witnesses who remained in the court room after an order was entered to exclude witnesses. These witnesses were permitted to testify on rebuttal despite their presence in the court room following testimony on direct examination. It is well established law that exclusion of witnesses is a matter of discretion for the judge and it was not prejudicial error to permit these witnesses to testify again. It was held in People v. Chennault, 24 Ill.2d 185,p.187, 181 N.E.2d 74:

> "The exclusion of witnesses is a matter within the sound discretion of the court and the exercise of that discretion will not be disturbed unless a clear abuse or prejudice to the defendant is shown."

Defendant also contends that it was error for the trial judge to have been shown and to consider during the hearing on aggravation and mitigation, F.B.I. records indicating previous charges as well as convictions. The records were read without objection. Defendant argues that prejudice was demonstrated in the trial judge's comment:

> "This man is a thief. One year probation in August, '52, three months in the House of Correction, armed robbery, two burglaries, one to five years. Went in on 4-26-59 and on 3-11-60 he got out."

It must be borne in mind that the defendant, on direct examination, himself had testified "I have served time in the penitentiary including one to five years on armed robbery on which I did three years and nine months coming out in 1959." There was no error committed when the Judge said the defendant "is a thief". He had been so found in the trial immediately preceding and his record of convictions supported the statement. The defendant's own testimony had referred to time served in the penitentiary for armed robbery. It was held in People v. Hobbs, 56 Ill. App. 2d 93, at pp. 98,99, 205 N.E.2d 503:

> "On appeal, it is only under rare and unusual circumstances that a reviewing court will interfere with the discretion of the trial judge in the imposition of a sentence. The Appellate Court, in reviewing a trial court's discretion in fixing punishment, will make allowance for the trial court's opportunity of observing witnesses and hearing them testify. The imposition of sentence is peculiarly within the discretion of the trial court, and unless clearly abused, the reviewing court will not interfere therewith. Accordingly, before an Appellate Court will interfere, it must be manifest from the record that the sentence is excessive and not justified by any reasonable view which might be taken of the record.24A CJS § 1878; code of Criminal Procedure of 1963 (Ill Rev Stats 1963, c 38, § 121-9 (b) (4).)"

We cannot say that the sentence imposed was excessive or unreasonable.

For the above reasons the judgment should be and is affirmed.

JUDGMENT AFFIRMED.

LYONS, P.J. and BURKE, J., concur.